



IN THE LABOUR COURT OF SOUTH AFRICA

CASE NO: 2024-150037

Not Reportable

In the matter between:

SUSANNA NAUDE

First Applicant

ZINRLE INGA TWAKU

Second Applicant

ANNAMARIE NIEWOUDT

Third Applicant

ANTOINETTE LOUISE DU TOIT

Fourth Applicant

NOKUTHULA PF MNCWANGO

Fifth Applicant

JACQUELINE BLAKE

Sixth Applicant

NOMASWAZI AMANDA MVULA

Seventh Applicant

NOMANDLA VIMBI-MUDAU

Eighth Applicant

ESTELLE MANUEL

Ninth Applicant

and

OFFICE OF THE CHIEF JUSTICE

First Respondent

SECRETARY GENERAL:

OFFICE OF THE CHIEF JUSTICE

Second Respondent

Heard: 31 December 2024

Order delivered: 31 December 2024

Judgment delivered: 21 January 2025

REASONS FOR ORDER

WHITCHER J

Introduction

[1] On 24 December 2024, the applicants filed for relief in the following terms:

1. *The forms and service provided for in the Rules are dispensed with and the matter is treated as one of urgency in terms of Rule 38.*
2. *The applicants' fixed-term contracts which are due to terminate on 31 December 2024 are renewed on the same terms and conditions.*
3. *Alternatively, to prayer 2, the applicants' fixed-terms contracts which are due to terminate on 31 December 2024 are extended pending final determination of the applicants' unfair labour practice referral to the Bargaining Council under case number GPBC1685/2024.*
4. *The first respondent is hereby interdicted and restrained from interviewing and placing candidates in the applicants' current positions as Judges' Secretaries within the Gauteng Division of the High Court of South Africa.*
5. *Costs of this applications in terms of Rule 56.*
6. *Further and/or alternative relief.*

[2] The first respondent opposed the application on various grounds: urgency; *res judicata*, *lis pendens* and jurisdiction.

[3] The application was heard on 31 December 2024, and, after hearing argument by both parties, I granted prayers 1 and 3.

[4] This judgment now constitutes the written reasons for the order granted.

The facts

[5] The material facts are not in dispute and are described in the tense as they stood on 31 December 2024.

[6] The applicants are all Judges' Secretaries, employed by the first respondent at different times at the Gauteng Division of the High Court, both in Johannesburg and Pretoria.

[7] Ever since their engagement, they have been employed on 'rolling' fixed-term contracts of employment¹: the first applicant since May 2008, the second since May 2015, the third since May 2018, the fourth since August 2011, the fifth since July 2017, the sixth since March 2010, the seventh since December 2017, the eighth since May 2011 and the ninth since July 2015.

[8] The term of the contracts, depending on when the applicants commenced employment with the first respondent, was initially a three-month contract which was translated into a one-year contract and eventually, in the case of all the applicants, a three-year contract.

[9] Despite notices to the contrary over the years, the applicants' contracts were always renewed. For example, in the case of the first applicant, despite such notices in relation to her last four contracts, these contracts were always renewed.

¹ That is, they were repeatedly renewed.

[10] All the applicants' fixed-term contracts are due to expire on 31 December 2024, save for the eighth applicant whose contract only expires in November 2025.

[11] The cause of the dispute before me is that on 28 August 2024 the first respondent gave notice essentially that the applicants' employment will end on 31 December 2024 and thereafter proceeded to advertise the posts they occupied.

[12] The opposing affidavit offers varying reasons for this:

(i) The applicants were on fixed-term contracts which automatically ended on 31 December 2024.

(ii) To role of a Judge's secretary has evolved. An *ad hoc* Judges' Committee established to evaluate same recommended the appointment of secretaries with legal qualifications who would serve on a fixed-term basis, and, in addition to standard clerical duties, provide focused legal support to their Judges. This model supports both the operational efficiency of Judges and the professional growth of young law graduates.

(iii) To address the first respondent's employment equity obligations. In this regard, the affidavit reads:

In accordance with the government's strategic priority of creating employment opportunities for the youth, which includes the stipulated target of 30% youth employment, the OCJ has undertaken measures to address challenges in meeting this mandate. In response, the Gauteng Division initiated a targeted intervention to facilitate job creation and youth graduate employment.

Consequently, on 4 October 2024, the OCJ advertised 64 positions as part of its graduate recruitment scheme ('the Graduate Scheme') for Judges' Secretaries, specifically aimed at advancing youth participation in the workplace while addressing its employment equity obligations.

...

In respect of the applicants' contractual renewals or extensions in the past, the renewals or extensions of their contracts were necessitated by operational requirements, specifically to address the gap between the expiration of the fixed-term contract and the completion of the recruitment process.

[13] Notably, the affidavit also records that:

The [Judges'] Committee advised that the Judge's Secretary's role should be fixed-term appointments, without indefinite extensions as such practices may contravene labour regulations and create employment uncertainties. *However, for Judge's Secretaries who have been on fixed-term contracts for an extended period and/or whose roles have effectively become permanent, a reclassification to permanent status could be considered.* [Emphasis added]

The dispute

[14] The applicants contend that they reasonably expected the first respondent to renew their fixed-term contracts of employment and/or retain them on an indefinite basis given the history of their employment with the first respondent. The first respondent, however, declined to renew their contracts or acknowledge their reasonable expectation of permanency. They also reasonably expected to be but were not short-listed in the advertised posts.

[15] In this regard, it is noted that:

(i) Section 186(1)(b) of the Labour Relations Act, 1995 *inter alia* provides that:

Dismissal means that an employee employed in terms of a fixed term contract of employment reasonably expected the employer – (i) to renew a fixed-term contract of employment on the same or similar terms but the employer offered to renew it on less favourable terms, or did not renew it; or (ii) to retain the employee in employment on an indefinite basis but otherwise on the same or similar terms as the fixed-term contract, but the employer offered to retain the employee on less favourable terms, or did not offer to retain the employee.

(ii) In terms of section 186(2)(a) of the Act, 'unfair labour practice' means *inter alia* any unfair act or omission that arises between an employer and employee involving unfair conduct by the employer relating to the promotion of an employee.

(iii) In terms of section 191 of the Act, if there is a dispute about the fairness of a dismissal (as contemplated in section 186(1)(b) or a dispute about an unfair labour practice, the dispute must be referred to the CCMA or

applicable bargaining council for conciliation and then to arbitration where the dispute remains unresolved.

[16] It is not in dispute that the applicants have lodged a dispute against the first applicant with the Bargaining Council in which they seek permanent employment, alternatively, the extension of their fixed term contracts, and that such dispute is pending arbitration before the bargaining council. There is accordingly a live, legitimate dispute pending arbitration. The first respondent essentially conceded this in its *lis pendens* claim.

[17] It is also not in dispute that prior to approaching this court and the High Court, the applicants had raised internal grievances regarding the status of their contracts.

[18] I turn now to specifically address why I deemed it appropriate to grant the applicants their prayers 1 and 3.

Res judicata

[19] The plea of *res judicata* is based on the fact that previous to this application the applicants on 2 December launched an urgent application before the High Court and that application was dismissed on 18 December 2024. The first respondent contended that the High Court “*conclusively* adjudicated” the dispute between the parties.

[20] The plea has no merit. The application before the High Court prayed for *interim* relief and was in any event based on a different cause of action and application, namely the review of a decision of the Judge President of the Gauteng High Court (who is not a respondent in the matter before me) and/or OCJ in terms of PAJA, alternatively, the principle of legality. The case before me also seeks *interim* relief and interim relief pending the finalisation of a dispute before a labour forum, namely a bargaining council. Also, the High Court did not “*conclusively* adjudicate” the dispute described in the present proceedings (nor even the dispute described in those proceedings).

Lis pendens and jurisdiction

[21] I also found no merit in these defences. An applicant is permitted to approach this court for urgent interim relief, pending the final determination of a dispute pending before the CCMA or applicable bargaining council. Provided the court does not make orders that would have the effect of finally determining disputes that fall within the province of the CCMA or a bargaining council.

Urgency

[22] This point is also based on the applicants' approach to the High Court. In my view, the fact that the applicants' representatives led them first into a misconceived High Court application should not count against them. At the end of the day, the applicants did not sit back when it became clear that their contracts would not be renewed but attempted to resolve the matter internally via various grievances and when that failed approached the courts within a reasonable time. There was only a 5-day delay between the receipt of the High Court judgment and the filing of the application before me.

[23] Moreover, as found below, the circumstances of the applicants presented extremely cogent grounds for urgency and the interim relief they sought.

The exceptional circumstances

[24] There is authority to the effect that the labour court in terms of s158(1)(a) of the Labour Relations Act, 1995 has the power to maintain or restore the status quo pending the outcome of arbitration proceedings by the CCMA or applicable bargaining council where an applicant persuades the court that extremely cogent grounds for such relief exists.²

² *University of the Western Cape Academic Staff Union and others v University of the Western Cape* (1999) 20 ILJ 1300 (LC) (per Mlambo J as he then was); *NUM v Elandsfontein Colliery (Pty) Ltd* [1999] 12 BLLR 1330 (LC); *SACCAWU v Shoprite Checkers (Pty) Ltd* [1997] 10 BLLR (LC). While the LAC questioned this proposition, it did not categorically reject same.

[25] In my view there are cogent grounds in this case because *on the face of things*³, the decision not to renew the applicants' contracts and/or consider them for permanent employment and the way the applicants' employment was ended is glaringly unfair. I say this because:

- (i) Despite the alleged fixed-and-temporary nature of their contracts, many of the applicants were kept in employment for years. In some cases, over 10 years.
- (ii) The [Judges'] Committee, specifically formed to assess the situation, advised that "for Judge's Secretaries who have been on fixed-term contracts for an extended period and/or whose roles have effectively become permanent, a reclassification to permanent status could be considered."
- (iii) Despite their long service and the history of repeated renewals, the applicants essentially were given a mere four months' warning that their contracts will not be renewed. While notice is not ordinarily required in (proper) fixed-term contracts because the contract sets the end date, it is arguable that where a fixed-term contract had been habitually extended with the result that the employee ended up working for many years and probably developed a sense of security of employment, reasonable warning of an intention not to renew the contract is due.
- (iv) It is highly questionable in law that employers may 'dismiss' employees as a means of attaining their equity targets. Here, of course, I use the term 'dismissal' as defined in section 186(1)(a) of the LRA. The defence of affirmative action is not mentioned in any provisions of the LRA that regulates the dismissal of employees.

[26] Ultimately, the only alternative available to the applicants was to accept a termination of their contracts and claim dismissal and wait a considerable time before the bargaining council determines their case. This was not a viable alternative – it would have deprived them of employment in circumstances where on the face of things they reasonably developed a sense of security of employment but must face unemployment on short notice for highly questionable reasons.

³ I stress on the face of things because these matters fall to be finally determined by the correct authority, namely the bargaining council, in an evidentiary hearing at arbitration with (presumably more comprehensive legal argument).

Costs

[27] I did not grant the applicants costs of suit. Whilst they were substantially successful, they wasted valuable time of the court and the respondents in persisting in argument with prayers for relief they obviously are not entitled to, namely their prayers for final relief. Even if prayer 4 was intended as a request for interim relief (as submitted during argument by counsel for the applicants), the applicants failed to establish that they have any right to prevent the recruitment process. If they succeed in demonstrating that they had a reasonable expectation of the renewal of their fixed term contracts, or of indefinite employment and the first respondent fails to show the dismissals were nevertheless fair, the remedies under section 193 of the LRA will kick in. Moreover, ill consideration was given to the drafting of important aspects of this application. The papers failed to properly demonstrate that a proper referral had been made to the Bargaining Council. Their saving grace was the first respondent's averment in the opposing papers that a dispute concerning the non-renewal of the applicants' fixed-term contracts and their claim for permanent employment has been referred to the Bargaining Council and was pending arbitration.

The order

[28] It is for all the reasons set out above that I made the order that I did, as reflected in paragraph 3 of this judgment, *supra*.

Benita Whitcher

Judge of the Labour Court of South Africa

APPEARANCES:

For the Applicants:

K Mvubu SC, with S Mirzoyev, instructed by Ningiza Horner Attorneys

For the First Respondent:

B Lecoge SC, with T Panda, instructed by State Attorney, Johannesburg